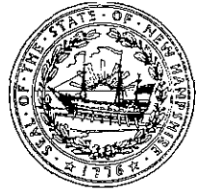




State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095
(603) 271-3503 FAX (603) 271-2982



Four B Beach Trust
3 Merrymeeting Lane
Rye, NH 03870

ADMINISTRATIVE FINE
BY CONSENT

No. AF 03-023

I. INTRODUCTION

This Administrative Fine by Consent is entered into by and between the Department of Environmental Services, Water Division, and Four B Beach Trust, pursuant to RSA 482-A:13. This Administrative Fine by Consent is effective upon signature by all parties.

II. PARTIES

1. The Department of Environmental Services, Water Division ("DES") is a duly constituted administrative agency of the State of New Hampshire, having its main office at 6 Hazen Drive, Concord, NH 03302-0095.
2. Four B Beach Trust is a trust having a mailing address of 3 Merrymeeting Lane, Rye, NH 03870 ("the Trust").

III. BACKGROUND

1. Pursuant to RSA 482-A, the Department of Environmental Services ("DES") regulates dredging, filling, and construction in or on any bank, flat, marsh, wetland, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11, I, the Commissioner of DES has adopted Wt 100 *et seq.* to implement this program.
2. Pursuant to RSA 482-A:13, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482-A:11, I, the Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.
3. RSA 482-A:4, I provides that "wherever the tide ebbs and flows, this chapter shall apply to all lands submerged or flowed by mean high tide as locally determined, any sand dune or vegetation thereon in the state of New Hampshire, and, in addition, to those areas within 100 feet of the highest observable tide line which border on tidal waters, such as, but not limited to, banks, upland areas, bogs, salt marsh, swamps, meadows, flats or other lowlands subject to tidal action."
4. RSA 482-A:3, I states that "No person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from [DES] .

5. RSA 482-A:3, VII provides that: "No person shall destroy, raze, deface, reduce, alter, build upon or remove any sand or vegetation from any sand dune in this state without a permit from the department; provided, however, that any person may remove sand which blows or drifts onto any lawn, driveway, walkway, parking or storage area, or boat ramp, or which blows or drifts in, on, or around buildings or other structures owned by the person. Upon request of the property owner, the department shall provide a preapplication assessment of any lot of record located in sand dunes."
6. Four B Beach Trust ("the Trust") is the owner of oceanfront land located at 2216 Ocean Boulevard, Rye, NH more specifically identified on Rye Tax Map 5.3, as Lot 63 ("the Property").
7. The Property's seawall is within 100 feet of the highest observable tide line, so the entire beach is within wetlands jurisdiction under RSA 482-A:4, I.
8. On November 17, 1998, DES issued a Letter of Deficiency ("LOD") informing the Trust that it had excavated approximately 150 linear feet of ocean beach in front of the seawall on the Property without a wetlands permit. Further, the LOD notified the Trust that further activity within the jurisdiction of the DES Wetlands Bureau requires a wetlands permit from DES.
9. On May 23, 2003, Brett Smith of B.W. Smith Excavation, Inc., used heavy equipment to remove sand adjacent to the Property retaining wall and grade the beach to the ocean.
10. On June 13, 2003, DES received a phone call from the Rye Building Inspector indicating that B.W. Smith personnel were using heavy equipment to remove and grade sand on the beaches in Rye.
11. On June 13, 2003, DES personnel responded to the complaint and inspected the Property and three neighboring properties. DES personnel observed that beach sand had been excavated adjacent to the Property seawall and graded back towards the ocean. Based on evidence observed at the Property, DES personnel estimated that between two and three feet of sand was pulled away from the wall towards the ocean.
12. On June 24, 2003 and July 2, 2003, DES reinspected the Property and the three neighboring properties to identify areas requiring restoration and to more specifically quantify impact areas. Based on the inspection, DES staff concluded that, so long as sand is allowed to accumulate naturally in the future, restoration of the Property is not necessary as its beach was not as severely affected as two of the other properties.
13. On July 7, 2003, DES personnel spoke with Mr. Smith who acknowledged removing sand adjacent to the Trust seawall on May 23, 2003, on behalf of the Trust. He stated that he did not think a permit was required.

IV. FINDINGS

1. Four B Beach Trust violated RSA 482-A:3, I by having B.W. Smith Excavation, Inc. dredge, excavate and fill the beach within wetlands jurisdiction without a permit from DES.

V. ADMINISTRATIVE FINES, PAYMENT, WAIVER OF HEARING

1. For the violations noted above, Env-C 614.05(a)(2) specifies a fine of \$2,000.
2. Four B Beach Trust agrees to pay \$2,000 upon execution of this Agreement by an authorized representative of Four B Beach Trust.
3. Payment under Paragraph V.2 shall be made payable to: "Treasurer, State of New Hampshire" and mailed to:

DES Legal Unit
Attn: Michael Sclafani, Legal Assistant
PO Box 95
Concord, NH 03302-0095

4. If any payment is made by check or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the check or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to the amount of the check or money order, to cover the costs of collection.
5. The effective date of this Administrative Fine by Consent will be the date on which it is signed by an authorized representative of the Trust, the Director of the Water Division, and the Commissioner of DES.
6. No failure by DES to enforce any provision of this Administrative Fine by Consent after any breach or default will be deemed as a waiver of its rights with regard to that breach or default, nor will such failures be construed as a waiver of the right to enforce each and all provisions of this agreement on any further breach or default.
7. This Administrative Fine by Consent shall fully resolve any and all claims that the State of New Hampshire may have against the Trust arising from the facts alleged herein, and the State shall not seek any other civil, criminal or administrative penalty against the Trust arising from the facts alleged herein. This shall not preclude the state from taking any action necessary to enforce this agreement or from taking action on future violations or against any other parties.

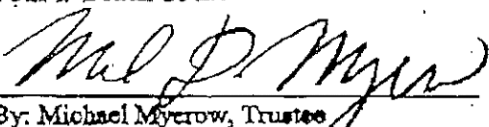
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TO

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Four B Beach Trust


By: Michael Myerow, Trustee
Duly Authorized

Date

7/11/03

Department of Environmental Services


Harry T. Stewart, Director
Water Division

Date

July 11 2003


Michael P. Nolin, Commissioner

Date

07 11 03

cc: Gretchen Rule, DES Legal Unit
Public Information Officer, DES PIP Office
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ EPB